

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Robert G. Taub, Vice Chairman; and  
Mark Acton

Market Dominant Product Prices  
Inbound Market Dominant Multi-Service Agreements  
with Foreign Postal Operators 1  
Australian Postal Corporation – United States  
Postal Service Bilateral Agreement (MC2010-35)  
Negotiated Service Agreement

Docket No. R2014-2

ORDER APPROVING AN ADDITIONAL INBOUND MARKET DOMINANT  
MULTI-SERVICE AGREEMENT WITH FOREIGN POSTAL OPERATORS 1  
NEGOTIATED SERVICE AGREEMENT  
(WITH AUSTRALIAN POSTAL CORPORATION)

(Issued December 30, 2013)

I. INTRODUCTION

On November 15, 2013, the Postal Service filed Notice, pursuant to 39 C.F.R. § 3010.40 *et seq.*, of a Type 2 rate adjustment concerning the inbound portion of a bilateral agreement (Agreement) with Australian Postal Corporation (Australia Post).<sup>1</sup> The Postal Service seeks to include the Agreement within the Inbound Market Dominant

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<sup>1</sup> Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, November 15, 2013 (collectively, Notice). See *also* Notice of United States Postal Service of Filing Executed Agreement (December 6, 2013).

Multi-Service Agreements with Foreign Postal Operators 1 (Foreign Postal Operators 1) product. Notice at 1. For the reasons discussed below, the Commission approves the Postal Service's request.

## II. BACKGROUND

*Product history.* The Commission approved the addition of the Foreign Postal Operators 1 product to the market dominant product list in Order No. 549, and concurrently included two agreements within that product.<sup>2</sup> The Commission has since approved the inclusion of additional agreements within the same product on grounds of functional equivalence, including an existing agreement with Australia Post (2012 Agreement).<sup>3</sup>

*Instant Notice.* The Notice identifies the Agreement as a successor to the 2012 Agreement; states that it results in an improvement over default rates established under the Universal Postal Union (UPU) Acts for inbound letter-post items; and addresses other data and information requirements in Commission rules. See Notice at 1-6. The Notice also includes redacted and unredacted versions of the Agreement and supporting documentation, an application for non-public treatment of materials filed under seal, and requests for exceptions to data collection and service performance reporting requirements in sections 3010.43 and 3055.3(a)(3), respectively. *Id.*, Attachments 1-2; see also Notice at 6.

*Initial Commission action.* On November 19, 2013, the Commission issued an order establishing a docket for consideration of matters raised in the Notice, inviting

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<sup>2</sup> See Docket Nos. MC2010-35, R2010-5, and R2010-6, Order Adding Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Approving Included Agreements, September 30, 2010 (Order No. 549).

<sup>3</sup> See Docket No. R2010-2, Order No. 996, Order Concerning an Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement, November 23, 2011.

public comment, and appointing a Public Representative to represent the interests of the general public.<sup>4</sup>

*Scope of Agreement; effective date and duration.* The Agreement includes negotiated pricing for various inbound letter-post products, including International Merchandise Return Service, small packets with delivery confirmation, and registered mail. Notice at 3, 9. The Agreement also includes the framework for an anticipated new service (for Direct Entry). *Id.* n.2; *see also id.*, Attachment 2 at 1 (Article 1, No. 6). Pursuant to the Agreement, the new rates will take effect January 1, 2014, unless the parties propose and agree to an alternative date. Notice at 2, Attachment 2 at 2. The Agreement is to remain in effect for two years, unless terminated sooner pursuant to contractual terms or extended by amendment. *Id.*, Attachment 2 at 7 (Article 22).

### III. THE POSTAL SERVICE'S POSITION

*Compliance with Commission Rules.*<sup>5</sup> 39 U.S.C. § 3622(c)(10)(A)(i) requires that the Agreement improve the net financial position of the Postal Service through reducing Postal Service costs or increasing the overall contribution to its institutional costs. The Postal Service states that it provides required information about expected financial improvements, costs, volumes, and revenues in the sealed financial workpapers. Notice at 3.

39 U.S.C. § 3622(c)(10)(A)(ii) requires that the Agreement enhance the performance of mail preparation, processing, transportation, or other functions. The Postal Service states that the Agreement includes the following operational and other improvements: (1) the framework for a new product to be introduced within the term of the Agreement; (2) clarification and limitation of Postal Service liability when items are detained at U.S. borders by enforcement officials other than U.S. Customs and Border Protection; and (3) improved accounting and settlement processes. *Id.* at 4.

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<sup>4</sup> Order No. 1881, Notice and Order Concerning Australian Postal Corporation Negotiated Service Agreement, November 19, 2013.

<sup>5</sup> *See generally* 39 C.F.R. § 3010.42.

39 U.S.C. § 3622(c)(10)(B) requires that the Agreement not result in unreasonable harm to the marketplace. The Postal Service states, among other things, that Australia Post maintains a generally dominant position in the market for Letter Post originating in its home country, and is therefore the only entity in a position to avail itself of an agreement with the Postal Service of this type and scope. *Id.* The Postal Service asserts that U.S. Private Express Statutes generally prohibit entities other than the Postal Service from carrying inbound international letters commercially after entry at a U.S. port, at least below certain price and weight thresholds. *Id.* The Postal Service represents it is unaware of any private entity that would be able to serve the United States market for inbound Letter Post from Australia on the terms and scale contemplated in the Agreement. *Id.* It then concludes that because there is no significant competition in the relevant market when inbound letter-post flows are considered in totality, the Agreement is unlikely to pose competitive harm to the marketplace. *Id.* at 5.

39 U.S.C. § 3622(c)(10) requires that agreements be made available on reasonable terms to similarly situated mailers. The Postal Service states that there are no entities similarly situated to Australia Post in their ability to tender the broad-based letter-post flows from Australia under similar operational conditions, nor any other entities that serve as a designated operator for Letter Post originating in Australia. *Id.* at 7. The Postal Service therefore states it finds it difficult to conceive of a “similarly situated mailer” to which it could make a similar agreement available for each country-specific flow. *Id.*

*Functional equivalence.* The Postal Service contends that the Agreement is functionally equivalent to the agreements previously included within the Foreign Postal Operators 1 product because it is, in all material respects, the same as the 2012 Agreement between Australia Post and the Postal Service as it relates to inbound market dominant services. *Id.* at 8. The Postal Service represents that, as with the 2012 Agreement, the relevant terms of the Agreement fit within the Mail Classification Schedule (MCS) language for the Foreign Postal Operators 1 product, and that the Agreement and the existing agreements therefore conform to a common description.

*Id.* The Postal Service also claims that the agreements share a common market, which it describes as foreign postal operators designated by their countries to fulfill the obligations of the UPU Acts, and asserts that the markets for the Agreement and 2012 Agreement are identical. *Id.* The Postal Service therefore submits that the Agreement is functionally equivalent to the 2012 Agreement, which it concludes is a logical baseline agreement to use for purposes of the functional equivalency comparison. *Id.* at 8-9.

The Postal Service also maintains that the agreements have similar cost characteristics and, with minor changes, are nearly identical. *Id.* at 8. As for differences between the two agreements, the Postal Service states that Annex 7 of the Agreement incorporates an amendment made during to the 2012 Agreement and that Annex 8 (concerning the anticipated product) is inoperative, but has been included to facilitate implementation without the need for formal amendment. *Id.* at 8-9. The Postal Service states the financial models are the same, although the inputs vary. *Id.* at 9.

The Postal Service identifies the following additional differences between the Agreement and the 2012 Agreement:

Article 1—revised to include two new purposes for the Agreement (International Merchandise Return Service and the anticipated new product);

Articles 2 and 4—revised to delete references to a Conditions Deadline;

Article 7—revised to expand the limitation of liability for items held in customs to include seizure by certain other U.S. law enforcement agencies;

Article 10—revised to reinforce the commercial nature of the Agreement;

Article 13—revised to reflect the two-year term of the Agreement;

Article 21—paragraph 2, revised to provide greater clarity of the provisions, regulations, and agreements that apply outside of the Agreement;

Article 22—revised to lengthen the time period for discussing renewal or amendment of the Agreement; and

an update to the name of the representative executing the Agreement on behalf of Australia Post.

*Id.* at 9-10.

The Postal Service states that none of these differences affect the cost or market characteristics of the agreements, nor do they detract from the conclusion that the Agreement is functionally equivalent to the 2012 Agreement. *Id.* at 10.

*Reporting exceptions.* Under 39 C.F.R. § 3010.43, the Postal Service is required to provide a detailed plan for providing data or information on actual experience under the agreement sufficient to allow evaluation of whether the negotiated service Agreement operates in compliance with 39 U.S.C. § 3622(c)(10). The Postal Service proposes that no special data collection plan be created for the Agreement because it intends to report information on the Agreement through the Annual Compliance Report (ACR) process, along with any necessary information about mail flows from Australia. *Id.* at 6. The Postal Service cites Order No. 996 as a standing exception to separate service performance reporting (otherwise required under rule 3055.3(a)(3)) for all agreements filed within the Foreign Postal Operators 1 product. *Id.*

#### IV. COMMENTS

The Public Representative filed comments on November 27, 2013.<sup>6</sup> No other comments were received. The Public Representative's review of the Agreement and its associated financial workpapers leads her to conclude that the Agreement is likely to improve the net financial position of the Postal Service or otherwise enhance the operational performance of the Postal Service during the contract period. PR Comments at 2. The Public Representative also concludes that the Agreement is functionally equivalent to the Australia Post 2012 Agreement. *Id.*

*Functional equivalence.* The Public Representative observes, with respect to functional equivalence, that the most significant change between the two agreements is the inclusion of International Merchandise Return Service and a new product to be introduced during the contract term. *Id.* She concludes that the inclusion of these

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<sup>6</sup> Public Representative Comments, November 27, 2013 (PR Comments).

products should not affect the functional equivalence of the Agreement to its predecessor. *Id.*

*Consistency with statutory criteria.* The Public Representative notes that under 39 U.S.C. § 3622(c)(10), the criteria for the Commission's review are whether the Agreement: (1) improves the net financial position of the Postal Service or enhances the performance of operational functions, (2) will not cause unreasonable harm to the marketplace, and (3) will be available on public and reasonable terms to similarly situated mailers. *Id.* The Public Representative states that the Postal Service has not provided an analysis that demonstrates that the Agreement meets criterion (1) as it relates to improving net finances, but finds that the Agreement should make some improvement in operational performance. *Id.* at 2-3.

In connection with her conclusion about the absence of an analysis in the Postal Service's filing, the Public Representative states that she performed an analysis that shows the negotiated inbound letter post rates should result in improvement over calendar year 2014 UPU default rates during the term of the Agreement. *Id.* She also observes that the Postal Service's financial workpapers only estimate the cost coverage of the Agreement, as is the practice in competitive negotiated service agreement (NSA) filings. *Id.* at 3. However, she asserts that market dominant NSAs must be evaluated to ensure they meet the requirements of 39 U.S.C. § 3622(c)(10), and therefore suggests that the Postal Service provide a clear analysis that demonstrates that the Agreement meets the requirements of 39 U.S.C. § 3622(c)(10). *Id.*

With respect to the second and third criteria, the Public Representative states that the Postal Service makes reasonable arguments that the Agreement will not cause unreasonable harm to the marketplace and will be available on public and reasonable terms to similarly situated mailers. *Id.* The Public Representative also states that if the Postal Service modifies the contract to introduce a new product, it should modify the financial workpapers to determine if inclusion of the anticipated new product will provide a net financial benefit to the Postal Service. *Id.*

## V. COMMISSION ANALYSIS

The Commission has reviewed the Postal Service's filing and comments filed by the Public Representative.

*Statutory responsibilities.* Under the statutory and regulatory provisions of 39 U.S.C. § 3622(c)(10) and 39 C.F.R. §§ 3010.40(a) and (b), the Agreement must either improve the net financial position of the Postal Service or enhance the performance of various operational functions and must not cause unreasonable harm to the marketplace. The Agreement also must be available on public and reasonable terms to similarly situated mailers. 39 C.F.R. § 3010.40(c).

The Commission finds that the negotiated rates in the Agreement will improve the net financial position of the Postal Service consistent with 39 U.S.C. § 3622(c)(10)(A)(i), as they will generate higher revenues, contribution, and cost coverage than otherwise applicable UPU default rates. It also finds, consistent with 39 U.S.C. § 3622(c)(10)(A)(ii), that the Agreement includes several provisions intended to enhance performance. With respect to 39 U.S.C. § 3622(c)(10)(B), the Commission finds that the Agreement will not cause unreasonable harm to the marketplace, given the contracting parties' status as designated postal operators and the prohibition against entities other than the Postal Service from carrying inbound international letters commercially (at least those below certain price and weight thresholds) after entry at a U.S. port.

*Functional equivalence.* The Postal Service cites the 2012 Agreement as the logical baseline for the instant Agreement and identifies various differences between the two agreements, including, among other things, two new purposes for the Agreement. Notice at 9. That comparison is useful and, for purposes of this proceeding, does not foreclose a finding of functional equivalence. The Commission therefore concludes that the Agreement may be included in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product, and revises the MCS as shown in the attachment following the Secretary's signature.



*Reporting exceptions.* The Postal Service proposes that no special data collection plan be created for the Agreement, essentially seeking a waiver of rule 3010.43's data collection reporting requirements. Notice at 6. Instead, it intends to report data and information related to the Agreement through the ACR process. *Id.* The Commission grants an exception from rule 3010.43.

The Postal Service invokes Order No. 996, which established a standing exception to the service performance reporting requirements of 39 C.F.R. § 3055 (a)(3) for Foreign Postal Operators 1 agreements, as support for an exception for this Agreement. *Id.* Order No. 996's standing exemption continues to apply.

*Follow-up submissions, including notice concerning second year of Agreement.* The Postal Service shall promptly notify the Commission if the effective date of the Agreement differs from the intended effective date. The Postal Service shall promptly notify the Commission if the Agreement terminates earlier than intended or is extended by amendment. In addition, within 30 days of the Agreement's expiration date, or early termination, the Postal Service shall file costs, volumes, and revenues associated with the Agreement. The Postal Service shall also file notice with the Commission of the introduction of the anticipated new product.

The Commission notes that UPU default rates (for use in the cost coverage test) have been published for Calendar Year (CY) 2014, but not for CY 2015, which constitutes the second year of the Agreement's term. Once the UPU default rates for CY 2015 become available, the Postal Service shall promptly supplement its filing in this case to confirm that cost coverage under the negotiated rates for CY 2015 exceed cost coverage under UPU default rates.

*Future Foreign Postal Operators 1 filings.* As the Public Representative points out, the Postal Service's Foreign Postal Operators 1 filings do not include an explicit analysis comparing cost coverage under UPU default rates to cost coverage under the negotiated rates, although the statute and the Commission's implementing rules require

a demonstration of net financial improvement.<sup>7</sup> See 39 U.S.C. § 3622(c)(10)(A)(i) and 39 C.F.R. §§ 3010.40(a)(1). Instead, those seeking to confirm the Postal Service's representations on this point must obtain access to a password-protected document on the UPU website to ascertain the controlling default rates and perform an independent analysis to determine if the net improvement test is met.<sup>8</sup>

In Docket No. R2012-4, responding to the same concern, the Commission concluded: "In future notices involving a Type 2 rate adjustment which [the Postal Service] asserts represents an improvement over default rates established under the UPU Acts for inbound Letter Post items, the Postal Service shall file workpapers supporting its assertion."<sup>9</sup>

Developments since issuance of Order No. 1058 do not present any reason to rescind the direction to provide support for a representation about the net improvement of negotiated rates over UPU default rates in Foreign Postal Operators 1 filings. As the Postal Service is required to rely on the UPU default rates to make its representation, affirmatively demonstrating that it has done so should not provide any additional material burden. Accordingly, consistent with the intent of Order No. 1058, future Foreign Postal Operators 1 filings shall cite with specificity to the source(s) of the UPU default rates used in the net improvement comparison (such as by UPU organizational unit, type of document, number, date, workpaper and any other pertinent identifying documentation). Inclusion of this data and information in future filings will not only bring

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<sup>7</sup> The Public Representative in Docket No. R2012-4 also raised a concern about the absence of an analysis explicitly addressing cost coverage in terms of UPU default rates. See Docket No. R2012-4, Public Representative Comments on Postal Service Notice Concerning Rate Adjustment for Bilateral Agreement with HongKong Post 2012 and Functionally Equivalent Negotiated Service Agreement, November 30, 2011, at 5.

<sup>8</sup> See, e.g., the approaches described in Docket No. R2013-4, Public Representative Comments on Postal Service Notice Concerning Type 2 Rate Adjustment and Royal PostNL 2013 Bilateral Negotiated Service Agreement, November 30, 2012, at 3; and Docket No. R2013-5, Public Representative Comments on Postal Service Notice Concerning Bilateral Agreement with Singapore Post Limited Negotiated Service Agreement, December 17, 2012, at 4.

<sup>9</sup> Docket No. R2012-4, Order No. 1058, Order Approving Request to Include HongKong Post Group Bilateral Agreement Within an Existing Market Dominant Product, December 20, 2011, at 6-7. See *also id.* at 8 (ordering paragraph no. 3).

practice into conformance with the direction in Order No. 1058 and this Order, but also facilitate expedited review of Foreign Postal Operators 1 filings, which is required under Commission rules.

## VI. ORDERING PARAGRAPHS

*It is ordered:*

1. The Australia Post Agreement filed in this docket is included within the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-35, R2010-5, and R2010-6) product.
2. The Commission approves the Type 2 rate adjustment requested in the Postal Service's November 15, 2013 Notice filed in this proceeding.
3. The Postal Service shall notify the Commission of the effective date of the Australia Post Agreement if it differs from the intended effective date. If the Agreement terminates early, the Postal Service shall notify the Commission within 30 days of the termination date. The Postal Service shall also promptly notify the Commission if the Agreement is extended.
4. Within 30 days of expiration, or upon early termination of the Australia Post Agreement, the Postal Service shall file cost, volume, and revenue data associated with the Agreement.
5. The Postal Service's request for an exception to the data reporting requirements in Commission rule 3010.43 is granted.
6. The standing exception to service performance reporting requirements established in Order No. 996 continues to apply.

7. Future Foreign Postal Operators 1 filings shall include supporting financial workpapers consistent with the direction in Order No. 1058 and the additional terms discussed in the body of this Order.

By the Commission.

Shoshana M. Grove  
Secretary

## CHANGES TO THE MAIL CLASSIFICATION SCHEDULE

The following material represents a change to the Mail Classification Schedule. The Commission uses two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

## Part A—Market Dominant Products

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### 1602.3 Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators

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#### 1602.3.5 Products Included in Group (Agreements)

Each product is followed by a list of agreements included within that product.

- Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1

*Baseline Reference*

Docket Nos. MC2010-35, R2010-5, and R2010-6

PRC Order No. 549, September 30, 2010

*Included Agreements*

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Australia Post Agreement, ~~R2012-2~~R2014-2, expires December 31, ~~2013~~2015

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